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In the Supreme Court of the United States

OCTOBER TERM, 1973

GEORGE BENZ AND SONS, PETITIONER

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Petitioner, the operator of a dairy in Norwood, Minnesota (Pet. 5), presents three challenges to the conduct of a 1969 referendum by which milk producers in portions of Minnesota and Wisconsin approved an amendment to the Minneapolis-St. Paul milk marketing order (7 C.F.R. 1068), enlarging the marketing area regulated by the order so as to include petitioner's dairy (Pet. 6).[1] Following a public hearing at which petitioner opposed the proposed expansion of the marketing area, the Department of Agriculture decided

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[1] The marketing order was issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.* The operation of this statute is described in *Zuber* v. *Allen*, 396 U.S. 168, and *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533.

to amend the marketing order if at least two-thirds of the producers of milk for sale in the proposed marketing area approved the amendment by referendum. 34 Fed. Reg. 3833. Of the 4,345 votes cast in the referendum, 4,202 or 96.7 percent approved the amendment (Pet. 7-8). Accordingly, the amended order became effective May 1, 1969 (Pet. 8).

Petitioner then filed an administrative petition pursuant to 7 U.S.C. 608c(15)(A) challenging, *inter alia*, the conduct of the referendum. When this petition was dismissed, petitioner commenced this action pursuant to 7 U.S.C. 608c(15)(B) seeking to set aside the amendatory order. The district court granted summary judgment for the Secretary of Agriculture (Pet. App. 25-30), and the court of appeals affirmed (Pet. App. 19-23).

2. The decisions of the courts below are in accord with the applicable statute and relevant precedents, and review by this Court is unwarranted.

Petitioner first questions the statutory authority for conducting a referendum of the type in issue here, *i.e.*, a referendum upon a proposed amendment which would enlarge the geographic area regulated by an existing milk marketing order (Pet. 10-12). The authority for such a referendum is 7 U.S.C. 608c(19),[2] which

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[2] At the time the referendum was held, that Section provided:

> For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or

provides that a producers' referendum shall be conducted for initial marketing orders and may be conducted for amendatory orders. As petitioner indicates (Pet. 11), Section 608c(19) does not specifically refer to amendments affecting the size of the area regulated, but there is no basis for implying any exception for this particular type of amendatory order. Moreover, the Secretary's authority to conduct a referendum upon such amendments and his authority to change by amendment the geographic area regulated by an existing marketing order is established. See *Freeman* v. *Hygeia Dairy Co.*, 326 F. 2d 271 (C.A. 5); *Benson* v. *Schofield*, 236 F. 2d 719 (C.A. D.C.), certiorari denied, 352 U.S. 976.

Secondly, petitioner raises the issue whether voting in the referendum should have been restricted to those producers who were not regulated under the old order but would become regulated if the proposed expansion was approved (Pet. 12-15). In the actual referendum, producers from the entire proposed marketing area, including the area already regulated, were eligible to vote (Pet. 7-8).[3] This class of voters was proper in

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the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

A 1972 amendment to this section, 86 Stat. 780, added a provision applicable to pears that is irrelevant to the present dispute.

[3] Petitioner is a "handler" not a producer, so it was ineligible to vote (Pet. 5; Pet. App. 28-29).

light of the statutory requirement that, prior to issuing a marketing order, the Secretary must determine that it is approved by at least two-thirds of the producers engaged in the production of milk for sale in the marketing area. 7 U.S.C. 608c(9)(B); *H. P. Hood & Sons, Inc.* v. *United States,* 307 U.S. 588, 598. The other courts of appeals that have considered this issue have specifically rejected petitioner's contention. *Freeman* v. *Hygeia Dairy Co., supra; Benson* v. *Schofield, supra.*[4]

Finally, petitioner questions the form of the ballot and the fact that two cooperatives voted as blocs on behalf of their members (Pet. 15-18). Section 608c(19) (quoted *supra,* n. 2) resolves both questions. The question on the ballot was, "Do you approve the issuance by the Secretary of Agriculture of the order as amended, regulating the handling of milk in the Minneapolis-St. Paul, Minnesota, marketing area?" (Pet. 7). Petitioner asserts (Pet. 15) that this ballot violated the statute and regulations because it failed to describe adequately the terms of the proposed amendment. Section 608c(19), however, states that the "nature, content, or extent of such description" on the ballot of the terms and conditions of the proposed order "shall not be a basis for attacking the legality of the order or any action relating thereto."

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[4] The court of appeals found that the amendatory order was necessitated by the fact that as population moved from the cities to the suburbs, the marketing of milk also moved, and "[h]andlers of milk who were regulated under the old order were competing with unregulated handlers, resulting in disorderly milk marketing situations" (Pet. App. 21). Thus, although the amendatory order would not alter the regulated status of handlers located in the original marketing area, such handlers were "affected" by the order, contrary to petitioner's assertions.

Sections 608c(19) and 608c(12) also provide for bloc voting by cooperatives, as occurred in the referendum here. This Court has upheld bloc voting by milk cooperatives even when their bloc constituted nearly two-thirds of the total votes cast so that the cooperatives effectively controlled the outcome of the referendum. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 557, 559-560, 578; see also, *H. P. Hood & Sons, Inc.* v. *United States, supra*, 307 U.S. at 597-599. Thus, petitioner's challenges to the conduct of the referendum in the present case are without merit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.